evidence failed to establish any of the liabilities alleged against the appellants.

Accordingly, I would allow this appeal with costs here and below.

Suffian F.J. concurred.

Appeal allowed.

Solicitors: *Skrine & Co.; Shearn, Delamore & Co.*

CHAMPION MOTORS (M) SDN. BHD. v. NORASHIKIN

[F.C. (Suffian, Ali and Ong Hock Sim F.JJ.) December 31, 1971]

[Kuala Lumpur — Federal Court Civil Appeal No. 60 of 1971]

Hire-purchase — Motorcar — Indemnity of owners — Vehicle insured with owners' official insurers — Failure to obtain cover against loss by civil commotion — Waiver.

Insurance — Motorcar under hire-purchase — Owners' official insurers — Loss by civil commotion excepted — Defence of waiver — Whether owners protected by saving clause.

This was an appeal against the decision of the High Court ([1971] 2 M.L.J. 217). The facts appear sufficiently from the judgment of Ali F.J.

The basis of the appellants' claim was that there was a breach of clause 8 of the hire-purchase agreement, the general effect of which was to impose on the respondent a liability to have the car insured against loss "from whatever cause arising".

The policy of insurance was issued by the official insurers of the appellants who knew or had reason to know that it did not cover loss arising from civil commotion. The insurance policy, on expiry, was renewed for the second year by the respondent on terms substantially similar to those contained in the expired policy. It was during the currency of the renewed policy that the loss occurred.

The appellants sought to be compensated for the loss by the respondent on the ground that she failed to have the car insured against civil commotion. The main defence was waiver. The respondent claimed that the appellants had agreed or consented to accept the policy as sufficient for the protection of their interests in the car.

Held, dismissing the appeal: although clearly there was a breach by the respondent of her obligation, but as the policy had all been arranged by the appellants with their own official insurers, it would be reasonable to infer that they had waived that breach, and for that reason they should bear the loss.

Case referred to:-

(1) *Barrett Bros. (Taxis) Ltd.* v. *Davies* [1966] 1 W.L.R. 1335.

The following cases were cited in argument: *A.E. Farr Ltd.* v. *Admiralty* [1953] 1 W.L.R. 965; *Akerib* v. *Booth* [1960] 1 W.L.R. 454; *Besseler Waechter Glover and Co.* v. *South Derwent Coal Co. Ltd.* [1938] 1 K.B. 408; *Pahang Lin Siong Motor Co. Ltd. & Anor.* v. *Kartar Singh* [1969] 1 M.L.J. 139; *Anglo-American Corp. (M) Sdn. Bhd.* v. *Dato Phua Cheng Leong* [1969] 2 M.L.J. 12, 15-16; *Barton* v. *Fitzgerald* 104 E.R. 944; *Cholmondeley* v. *Clinton* 37 E.R. 527; *Solly* v. *Forbes* 129 E.R. 871; *Coniers* v. *Holland* 74 E.R. 488; *Cook* v. *Newcomb* 83 E.R. 24; *Birmingham and District Land Co.* v. *L. and N.W. Ry* (1888) 40 Ch. D. 268 at p. 285, 286; *Salisbury* v. *Gilmore* [1942] 1 All E.R. 457; *Central London Property Trust Ltd.* v. *High Trees House Ltd.* [1947] K.B. 130; *Charles Rickards Ltd.* v. *Oppenheim* [1950] 1 All E.R. 420 at p. 423; *Plasticomda Societa Per Azion* v. *Davidsons* [1952] 1 Lloyd's Rep. at p. 538, 539; *Sarat Chunder Dey* v. *Gopal* I.L.R. 20 Cal. 296.

FEDERAL COURT.

A. D. Rajah for the appellants.

Raja Abdul Aziz Addruse (*Yaacob Hussein Merican* with him) for the respondent.

Suffian F.J.: I have had the advantage of reading in draft my brother Ali's judgment and with respect I agree with him that this appeal should be dismissed — in other words I agree that the loss of this car should be borne by Champion Motors, its owners (plaintiffs-appellants).

The whole appeal in my view turns on clause 16 of the hire-purchase agreement. That clause consists of two sentences. The first sentence without more would have made the defendant-hirer (respondent) clearly liable for the loss. But its effect has been cut down by its first sentence. That sentence clearly means that notwithstanding the second sentence Champion Motors may at any time waive a breach by the defendant of her obligation to insure the car against loss in civil commotion, but that waiver cannot excuse a subsequent breach: it excuses only the one breach. Here clearly there was a breach by the defendant of her obligation, but as the policy had all been arranged by Champion Motors with their own official insurers, it would be reasonable to infer and I do infer that Champion Motors had waived that breach.

That policy was for a year, and when it was about to expire on 25th December, 1968, it was renewed by the defendant for another year, and it was during the currency of this renewal period that the car was destroyed. The evidence as to who renewed it was very sketchy. The defendant said in evidence that it was she who renewed it, and there was no evidence that the renewal was done through the intervention of Champion Motors. But I think that it is reasonable to infer that Champion Motors who knew that the policy for the first year did not cover loss from civil commotion must have known from their experience in the motoring world that the defendant at the end of the first year would have renewed it on the old terms. Yet, knowing all that, they did not under clause 8 of the agreement effect the necessary policy themselves and charge the premium to the defendant, which they had a right to do. In the circumstances I think that it is reasonable to infer that Champion Motors must have again waived a breach by the defendant of her obligation to insure the car against loss from civil commotion.

For the above reasons I would hold that Champion Motors should bear this loss. They should also pay costs here and in the courts below.

Ali F.J.: The dispute in this appeal arose out of the disturbances which occurred on May 13, 1969. A car owned by the appellants, a firm of motor dealers in Kuala Lumpur, was hired out to the respondent under a hiring or hire-purchase agreement. It was burnt or destroyed during the disturbances which, the parties in this appeal agree, were in the nature of a civil commotion. On the date of the agreement the

car was insured against loss arising from, what I may describe as, normal accidental risks such as fire or the like. It was, however, not insured against abnormal risks such as civil commotion, riot or civil war so that if the car was lost or damaged in such an event the insurance company might under the "GENERAL EXCEPTIONS" clause repudiate liability to indemnify The insurance policy on expiry was renewed for the second year by the respondent on terms substantially similar to those contained in the expired policy. It was during the currency of the renewed policy that the loss occurred. The appellants sought to be compensated for the loss by the respondent on the ground that she failed to have the car insured against civil commotion. Nothing turned on the correctness or otherwise of the amount claimed as damage or indemnity. The only question for the trial court was on liability.

The basis of the appellants' claim was that there was a breach of clause 8 of the hiring agreement the general effect of which was to impose on the respondent a liability to have the car insured against loss "from whatever cause arising". In the appellants' view the words in quotes can be extended to include civil commotion. Although there was some controversy over the meaning which should be given to these words, nothing really turned on it. The main defence was waiver. The facts on which the defence of waiver was based do not appear to be in dispute. The policy of insurance which took effect about the same time as the hiring agreement was issued by an insurance company chosen by the appellants who knew or had reason to know that it did not cover loss arising from civil commotion. The respondent claimed that the appellants had agreed or consented to accept the policy as sufficient for the protection of their interests in the car. In other words they have by their conduct led her to believe that the right to have the car insured against civil commotion would not be insisted upon and that acting on this belief she renewed the policy for the second year on the same terms as before To this it might be added that if the appellants had thought of the possibility of loss occurring as a result of civil commotion, there was nothing to prevent them from insisting on having the car insured against such loss or to effect such insurance themselves. Indeed, clause 8 provided that —

"... If any breach of his obligations under this clause shall be made by the hirer the owners shall be at liberty during the hiring for their own benefit to effect or keep on foot any such insurance as aforesaid and to recover from the hirer any sum or sums paid by them for such purpose...."

The truth is that neither party to the agreement could foresee the events of May 13 and the appellants became wise to this only after the loss has occurred On the facts so far stated, there seems to be substance in the respondent's defence of waiver. For a statement of principle it is sufficient to refer to a passage from the judgment of Lord Denning in *Barrett Bros. (Taxis) Ltd.* v. *Davies*[1] which was cited in the courts below. On page 1339 the Master of the Rolls said —

"If one party by his conduct leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief and he does act on it, then the first party will not afterwards be allowed to insist on the strict rights when it would be inequitable for him so to do: see *Plasticmoda Societe Per Azioni* v. *Davidsons (Manchester) Ltd.* ([1952] 1 LLR. 527, 539)."

The learned president of the sessions court who tried this case rejected the defence of waiver He took the view that in terms of clause 16 of the hiring agreement it was not open to the respondent to rely on waiver. Thereupon judgment was entered for the appellant but this was reversed, on appeal, by the High Court. Harun J. was of the view that clause 16 did not apply. On the facts he held, and I agree with him, that the defence of waiver was sustainable. The appellants have now appealed to this court.

The only question for our determination, as it seems to me, is whether clause 16 is applicable to this case. I agree with the learned appeal judge that it did not. The clause is in these terms:

"No waiver by the owners of any breach by the hirer of any of his obligations under this agreement shall operate as a waiver or notice of or consent to any subsequent breach. No time or other indulgence granted by the owners shall affect their strict rights under this agreement."

As may be noticed, it speaks of "waiver of any breach" and not "waiver of a contractual right". Needless to say the one is different from the other. When the contractual right has been waived, it is idle to speak of a breach of contract. The learned appeal judge apparently had this in mind when he said:

"... There was in effect an agreement between the parties that the vehicle will not be insured against loss or damage occasioned by riot or civil commotion and therefore clause 16 will not apply...."

It will not apply, I think, for another reason. The liability to insure under clause 8 was a continuing liability in the sense that for as long as the hiring agreement was in force and before any loss or damage has occurred the respondent was under an obligation to have the car insured against loss. In other words, the appellants have the right to insist on the car being so insured. If the respondent failed or to use the words of clause 8 "If any breach of his obligations under this clause shall be made by the hirer", it was open to the appellants to exercise the right to effect the insurance themselves and to recover the premiums from the respondent. Of course, if loss occurred before they could exercise this right, the only course of action open to them would be to sue the respondent for breach of contract. In such an event to waive the breach would clearly be unthinkable. Even if it is possible to say that the appellants were prepared to waive the breach, what other breach of clause 8 can subsequently occur to attract clause 16? With respect, I think the learned president of the sessions court was under a misconception when he said that the right to renew insurance annually not being automatic was a valid reason for thinking that the breach of clause 8 occurred twice — once during the first year of insurance and again after it was renewed for the second year. In this way, he held, assuming the first breach having been waived, that such waiver could not be set up against the subsequent breach. In my opinion, annual renewal of insurance, whether automatic or otherwise, is strictly a matter between the insured and the insurance company. The respondent, as the insured must renew in order to fulfill her obligation un-

der clause 8. If she does not, she commits a breach because the liability to insure and to keep the insurance on foot is one continuous liability regardless of whether the right of renewal is automatic or otherwise. It would seem plain, therefore, that clause 16 of the hire-purchase agreement cannot possibly apply to a breach of clause 8. The appellants, therefore, have no answer to the respondent's defence of waiver in this case.

Accordingly, this appeal must be dismissed with costs.

Ong Hock Sim F.J.: I have had the advantage of reading the judgments of my brother Suffian and my brother Ali with which I concur.

Appeal dismissed.

Solicitors: *Lovelace & Hastings; Rithaudeen & Aziz.*

PR. SP. PERIAKARUPPAN CHETTIAR v. YONG BOOK FONG

[F.C. (Azmi, L.P., Suffian and Ong Hock Sim, F.JJ.) December 31, 1971]

[Kuala Lumpur — Federal Court Civil Appeal No. 79 of 1971]

Contract — Loan — Reimbursement of monies — Entitlement to — Contracts (Malay States) Ordinance, 1950, s. 70 — Interpretation of.

Practice and Procedure — Judgment — Variation of order of trial court — R.S.C. 1957, O. 40 r. 11.

This was an appeal against the decision of the High Court ([1972] 1 M.L.J. 13). The present appellant was the third defendant in the court below.

The respondent/paintiff borrowed some money from a firm of chettiars in Muar, on the security of two pieces of land, one piece belonging to his wife and the other to himself, in order to assist the defendants in satisfying a judgment obtained against them in a Malacca suit. The loan was for $7,000, the monthly interest on which the defendants had agreed to pay to the Muar chettiars. The respondent did not charge the defendants any interest.

The defendants failed to pay the monthly interest, and under threat by the Muar chettiars to sell the two pieces of land, the respondent sold his land and paid off the Muar chettiars. He thereupon sued the defendants for his money.

The learned trial judge held that the respondent was a person interested in the payment of the money within the meaning of section 70 of the Contracts (Malay States) Ordinance, 1950, and therefore it was in his interest to pay off the loan in order to save his land from being foreclosed.

Held, allowing the appeal (Ong Hock Sim F.J. dissenting): the respondent was bound under the contract by law to pay the debt to the Muar chettiars. Therefore, he could not be regarded as a person interested in the payment of money within the meaning of section 70 of the Contracts (Malay States) Ordinance.

Cases referred to:-

(1) *Umed Singh & Anor.* v. *Behari Lal & Anor.* A.I.R. 1922 Nag. 50 and 52.

(2) *Sudhangshu Kumar Roy* v. *Banamali Roy* A.I.R. 1946 Cal. 63.

(3) *Somashastri* v. *Swamirao Kashinath* (1917) I.L.R. 42 Bom. 93.

(4) *Rasappa Pillai* v. *M.Z.D. Reddiar & Ors.* A.I.R. 1925 Mad. 1041, 1042.

(5) *C. Chettiar* v. *P.V. S.P. M. Chettiar* A.I.R. 1966 Mad. 426, 427.

(6) *Brook's Wharf and Bull Wharf, Ltd.* v. *Goodman Bros.* [1937] 1 K.B. 534 at p. 543-544.

(7) *Facchini* v. *Bryson* (1952) 1 T.L.R. 1386.

(8) *Tool Metal Manufacturing Co. Ltd.* v. *Tungsten Electric Co. Ltd.* [1955] 1 W.L.R. 761.

(9) *Robinson* v. *Geisel* [1894] 2 Q.B. 685 at p. 687.

The following cases were also cited in argument: *Haji Mohd. Dom* v. *Sakiman* [1956] M.L.J. 45; *Blay* v. *Pollard & Morris* [1930] 1 K.B. 628 head-note; *Chettinad Bank Ltd. of K.L.* v. *Sivagamipillay (f)* [1934] M.L.J. 203; *Umed Singh & Anor.* v. *Bihari Lal & Anor.* A.I.R. 1922 Nagpur 50; *Shettithi* A.I.R. 1934 Mad. 628; *Baishnar* v. *Puri Bank* A.I.R. 1963 Orissa 42, p. 44, 1st column; *Muthuswami Kavundan & Ors.* v. *Pnmayya Kavandan & Ors.* A.I.R. 1928 Mad. 820.

FEDERAL COURT.

W. H. Sault (*H. Ball* with him) for the appellant.

S. D. K. Peddie for the respondent.

Cur. Adv. Vult.

Azmi L.P.: I have had the opportunity of reading the judgment of Suffian F.J. and I am inclined to agree with him.

The learned trial judge had apparently accepted the view expressed by Halifax A.J.C. in *Umed Singh & Anor.* v. *Behari Lal & Anor.*(1) which read as follows. At page 50: —

"I am unable to see any justification for the restriction placed upon the meaning of either of the two expressions used in section 69 of the Contract Act, (substantially similar to section 70 of the Contracts (Malay States) Ordinance 1950) though there appears to be some judicial authority for holding that a person legally bound to make a payment cannot be called a person merely interested in making it. But there is none at all for the proposition that the legal liability to pay, contemplated by the section in respect of the person who does not make the payment, is only such a liability as can be enforced by the person to whom the payment is to be made. Here the defendants were 'bound by law to pay' because they were legally bound to do so under their contract with the plaintiffs, and the fact that the mulguzar could not enforce this contract seems to me to have no bearing on the matter at all. To restrict the meaning of the plain words of the section in that way is to import many other words into it which the legislature could have put there but did not."

At page 52: —

"I hold then with regard to section 69 of the Contract Act that the words 'interested in the payment of money' do not exclude the case of a person who in addition to being so interested is also legally bound to make the payment, and that the words 'bound by law to pay' include all cases of persons legally bound to pay whether under contract, or otherwise, and in the case of a contract, whether it is enforceable by the person to whom the payment is to be made or not."

The contrary view, however, is expressed in *Sudhangshu Kumar Roy* v. *Banamali Roy*(2) where Anderson J. expressed it thus: —

"That neither section 69 or 70 of the Contract Act can have any application when a man pays a debt for which he himself is personally liable."

I would, however, prefer the view expressed by Anderson J. and in the circumstances would say that the respondent being bound under the contract by law to pay the debt to the Muar chettiars could therefore not be regarded as a person interested in the payment